STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-372-S
v.	)	PERB Decision No. 732-S
STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS,	)	May 3, 1989
Respondent.	)	

Appearances: Shawn P. Cloughesy, Legal Counsel, for the California Peace Officers Association; Department of Personnel Administration by Roy J. Chastain, Labor Relations Counsel, for the State of California, Department of Corrections.

Before Hesse, Chairperson; Porter, Craib, Shank and Camilli, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of the Board agent's dismissal, attached hereto, of its charge that the respondent violated section 3519.5(a) and (b) of the Ralph C. Dills Act (Act). Subsequent to this filing, the California Correctional Peace Officers Association requested that the appeal be withdrawn. The Board has considered the request and concurs that such a withdrawal is in the best interest of the parties and is consistent with the Act. (Gov. Code, secs. 3512 et seq.)

It is hereby ORDERED that the appeal of the Board agent's decision in Case No. S-CE-372-S is WITHDRAWN WITH PREJUDICE.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

October 17, 1988

Shawn P. Cloughesy
Legal Counsel
California Correctional Peace Officers
Association
3780 Rosin Court, Suite 200
Sacramento, CA 95834

Re: California Correctional Peace Officers Association v. State of California. Department of Corrections
Unfair Practice Charge no. S-CE-372-S
DISMISSAL and Refusal to Issue Complaint

Dear Mr. Cloughesy:

The above-referenced case alleges that the State of California, California Department of Corrections (State) discriminated against DeAnna Hudson because of her involvement in conduct protected by the Ralph C. Dills Act. This conduct is alleged to violate sections 3519(a) and (b) of the Dills Act.

I indicated to you in my attached letter dated September 23, 1988 that the above-referenced charge was subject to deferral to arbitration. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You are further advised that unless you amended the charge or withdrew it prior to September 29, 1988, it would be dismissed. On September 28, you requested and I approved an extension of time in which to file an amended charge. On September 30, the first amended charge was filed.

The first amended charge is identical to the original charge with the exception of two additional statements. First, the California Correctional Peace Officers Association (CCPOA) contends that Lake Elsinore School District (1987) PERB Decision No. 646 should not apply to this unfair practice charge since the Fourth District Court of Appeal decision did not become final until after this charge was filed. Second,

deferral to arbitration of this charge would be inappropriate because section 5.03 of the Memorandum of Understanding (MOU) between CCPOA and the State of California does not prevent an employee from filing a discrimination action with the Public Employment Relations Board (PERB).

With respect to the first argument, Lake Elsinore School District, supra, was issued by PERB on December 18, 1987. This charge was filed on February 16. 1988, some three months later. The basic assertion of this charge is that DeAnna Hudson was discriminatorily denied a position as Parole Agent II in the Fresno office This denial occurred between November 9 and 23, 1987. The grievance procedure allows an employee 15 days from date of discovery to file a timely grievance. There was no reason offered for the failure of the charging party to file a timely grievance. Neither the Lake Elsinore nor the Dry Creek standards prevented the filing of a timely grievance. The fact that such a grievance was not filed does not relieve the PERB of its obligation to follow the statute.

CCPOA's assertion that an employee has an election of options to make under section 5.03 of the MOU is correct. However, the jurisdictional standard stated in the Lake Elsinore, supra, requires deferral to arbitration in situations where the conduct complained of in the unfair practice is covered by a contract or MOU which ends in binding arbitration. Thus, it would apply in a situation such as this where submission of the dispute to binding arbitration is an option. Essentially, CCPOA argues that the individual employee's determination that he/she wishes to have the dispute resolved by PERB can confer jurisdiction on PERB. As explained in Lake Elsinore, supra, at page 19, ". . • where this Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, nor by waiver or estoppel." (citations omitted) Therefore, it would be inappropriate for PERB to assert jurisdiction in the presence of such a clause.

Charging Party also wrote me a letter on October 12, 1988 arguing that deferral was inappropriate in this case for essentially the same reason as discussed above. That is, if the employee chose to go to PERB then the option of binding arbitration would be foreclosed and deferral would be inappropriate. A close examination of MOU section 5.03 does not support this scenario. If the employee chooses to go to PERB this is not an irreversible decision. Rather section 5.03 requires only that ...[i]n either case, there shall only be one bite of the apple and a decision in one forum shall act as collateral estoppel in the other forum, except if one forum defers to the other." (emphasis added). The MOU itself appears to anticipate the possibility that deferral would be

appropriate. Thus, it appears that the parties could switch from PERB to binding arbitration. This argument does not bar deferral of this case.

Accordingly, this charge must be dismissed as deferred to arbitration.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Administrative Code, title 8, section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The

request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Administrative Code, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

CHRISTINE A. BOLOGNA
General Counsel

By
Robert Thompson
Deputy General Counsel

Attachment

cc: Roy J. Chastain

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PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

September 23, 1988

Shawn P. Cloughesy
Legal Counsel
California Correctional Peace Officers
Association
3780 Rosin Court, Suite 200
Sacramento, CA 95834

Re: California Correctional Peace Officers Association v. State of California. Department of Corrections
Unfair Practice Charge no. S-CE-372-S
WARNING LETTER

Dear Mr. Cloughesy:

The above-referenced case alleges that the State of California, California Department of Corrections (State) discriminated against DeAnna Hudson because of her involvement in conduct protected by the Dills Act. This conduct is alleged to violate sections 3519(a) and (b) of the Dills Act.

My investigation revealed the following facts: DeAnna Hudson has been a Parole Agent with the Department of Corrections for the past 16 to 17 years. She became the first job steward for the California Correctional Peace Officers Association (CCPOA) at the Fresno Parole Office in approximately January, 1986. She participated as a member of the CCPOA negotiating team from January 1987 through July of 1987. On April 27, 1987, Ms. Hudson filed an unfair practice charge against the Department of Corrections concerning alleged reprisals taken by Cynthia Tigh and Jack Payne. In the Fall of 1987, Ms. Hudson applied for an open position of Parole Agent II at the Fresno Unit Office. She was interviewed on November 9, 1987 by a panel which included Ms. Tigh and Mr. Payne. She was assigned to an acting assistant unit supervisor (Parole Agent II) position on November 26, 1987. She remained in this position until January 4, 1988 at which time another individual was assigned permanently to the position. Ms. Hudson alleges that she was not hired for the permanent position because of her

previous participation in CCPOA activities as well as the filing of a unfair practice charge with PERB.

Ms. Hudson's position is part of bargaining unit 6 which is exclusively represented by the CCPOA. The State and CCPOA are parties to a Memorandum of Understanding (MOU) which includes Article 5.03, which reads:

> Protected Activity.
>
> The State and the union shall not impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees or otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by the State Employer-Employee Relations Act (SEERA).
>
> Requested remedy for violation of this section shall either be through the Public Employment Relations Board (PERB) or through the arbitration procedure contained in this Agreement. In either case, there shall only be one bite of the apple and a decision in one forum shall act as collateral estoppel in the other forum, except if one forum defers to the other.

Article 6.02 of the MOU defines grievance as "any dispute of one or more employees or a dispute between CCPOA and the State involving the interpretation, application or enforcement of the provisions of this Agreement, or involving a law, policy or procedure concerning employment-related matters not covered in this Agreement and not under the jurisdiction of the State Personnel Board (SPB)." The final step of the grievance procedure is submission of the dispute to an arbitrator whose decision on the matter is final and binding.

Section 3514.5(a)(2) of the Dills Act states, in pertinent part, that PERB,

> shall not. . . issue a complaint against conduct also prohibited by the provisions of the. . . [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to

Section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Rule 32620(b)(5) (California Administrative Code Section 32620(b)(5)) also requires the investigating board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that the State has discriminated against Ms. Hudson based on her protected activities is prohibited by Article 5.03 of the MOU. This section essentially parallels the protections provided by the Ralph C. Dills Act.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See PERB Regulation 32661 (California Administrative Code, title 8, section 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.

If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before September 29, 1988, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely,

Robert Thompson
Deputy General Counsel

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